IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROBERT KLEIN, on behalf of himself and all others similarly situated, and NATHAN RAMSEY, on behalf of himself and all others similarly situated,

Plaintiffs,

-against-

RYAN BECK HOLDINGS, INC. and RYAN, BECK & CO., INC.,

Defendants.

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Index No. 06-cv-3460 (DAB)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF ATTORNEYS' FEES, LITIGATION EXPENSES, AND PLAINTIFF ENHANCEMENTS

DATE: June 29, 2010
TIME: 2:30 pm
CRTRM:
JUDGE: Hon. Deborah A. Batts

I. INTRODUCTION

Plaintiffs' attorneys have successfully negotiated a $1,313,064 all-cash settlement ("Settlement") that resolves all of the pending lawsuits in this proceeding against defendant Ryan Beck Holdings, Inc. and Ryan Beck & Co. (hereinafter "Ryan Beck" or "Defendants"). *See* Declaration of Robert Abrams in Support of Settlement and in Support of Request for Attorneys' Fees, Attorneys' Expenses and Enhancements for Named Plaintiffs ("Abrams Decl.") ¶ 12. As permitted under Sections 1.1.1, 1.2.4 and 2.10.1of the "Joint Stipulation and Settlement Agreement," Docket No. 5 ("Stipulation"), plaintiffs' attorneys now move for an award of attorneys' fees in the amount of $433,000.00, or 33% of the common fund. The lodestar of $940,687.00 reported by the three law firms involved in this case represents approximately 217% of the requested award of attorneys' fees. Abrams Decl. ¶ 15 and Exhibit (" Ex.") 4; Declaration of R. Bruce Carlson ("Carlson Decl.") ¶ 5 and Ex. 2; Declaration of Jacqueline Sailer ("Sailer

Decl.") ¶ 5 and Ex. 1. Thus, plaintiffs' counsel is not requesting a multiplier of lodestar which, in this district, may be awarded at the court's discretion.

In addition, pursuant to the Stipulation §§ 1.1 and 2.10.1, plaintiffs' counsel also requests an award of expenses in the amount of $15,000.00. The actual expenses reported by plaintiffs' counsel, however, exceed $15,000.00. *See* Abrams Decl., ¶ 16; Carlson Decl. ¶ 6; Sailer Decl. ¶ 7 and Ex. 2.

Finally, pursuant to the Stipulation §§ 1.1 and 2.10.2, plaintiffs request that the Court award the 2 named plaintiffs $10,000 each for the time they spent, and the risk they undertook, in bringing these lawsuits on behalf of the class. Abrams Decl. ¶¶ 17-18.

This motion is unopposed. Although the proposed attorneys' fees, litigation expenses, and plaintiff enhancements were clearly disclosed in the "Notice of Class Action Settlement" (Exhibit 1 to the Declaration of Lance Blair in Support of Final Approval of Settlement ("Blair Decl."), filed herewith as Exhibit 2 to the Abrams Declaration) no class member has objected to any of these amounts.

Plaintiffs' attorneys faced substantial risk in bringing these claims. There are no reported cases that hold that stockbrokers are entitled to overtime pay under federal or state law. Instead, during the course of this litigation, the U.S. Department of Labor issued an opinion letter that threatened to undermine plaintiffs' primary theory of the case. Abrams Decl. ¶ 5, Ex. 3. Despite these obstacles, plaintiffs' attorneys negotiated a very favorable settlement for the class.

For the reasons discussed below, plaintiffs respectfully request that the Court award the requested fees, expenses, and enhancements.

II. ARGUMENT

A. THE COURT SHOULD APPROVE THE REQUESTED ATTORNEYS' FEES

1. Legal Standard

In determining a fee award in a case such as this, the Court may use either the lodestar method of analysis or the percentage of recovery method, although in a common fund case, such as the present case, the percentage of recovery approach is preferred.

a. Lodestar Analysis

In determining the proper remuneration of attorney's fees to award, courts within the Second Circuit apply the "presumptively reasonable fee analysis." *Porzig v. Dresdner, Kleinwort, Benson, North America LLC*, 497 F.3d 133, 141 (2d Cir. 2007). This presumptively reasonable fee is known as the "lodestar figure." *Jacobson v. Peterbilt Electrical Contracting, Inc.*, CV-03-3413 (CPA), 2008 U.S. Dist. LEXIS 29919, at *10 (E.D.N.Y. Apr. 10, 2008) (ERISA litigation) (citing *Arbor Hill Concerned Citizens Neighborhood Ass'n v. County of Albany*, 493 F. 3d 110 (2d Cir. 2007). This lodestar figured is computed by multiplying the number of hours reasonably expended on the litigation by the hourly rates of the attorneys. *Id*. (citing *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 172 (2d Cir. 1998)). In addition, a court may increase the lodestar figure by applying a multiplier based on various factors such as the risk of the litigation and the performance of the attorneys. *Savoie v. Merchants Bank*, 166 F.3d 456, 460 (2d Cir. 1999).

In connection with determining the reasonable lodestar figure, courts in this district have been guided by the following criteria: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation;

(4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *In re: Polaroid ERISA Litigation*, No. 03 Civ. 8335 (WHP), 2007 U.S. Dist. LEXIS 51983, at **6-7 (S.D.N.Y. Jul. 19, 2007) (citing *Goldberger v. Integrated Resources, Inc.*, 209 F.3d 43, 47 (2d Cir. 2007).

i. The Time and Labor Expended By Counsel Warrants the Requested Fee

The attorney hours and hourly rates for plaintiffs' attorneys are set forth in the declarations of Robert Abrams, Gary F. Lynch and Jacqueline Sailer, all filed herewith. These hours and rates are summarized in the following chart:

Firm	Cumulative Hours	Cumulative Lodestar
Wolf Haldenstein Adler Freeman & Herz LLP	1,079.90	$436,390.00
Carlson Lynch Ltd.	791	$341,600.00
Murray, Frank & Sailer LLP	322.50	$162,697.00
TOTALS	2193.4	$940,687.00

Dividing the requested fee of $433,000 by the total lodestar of $940,687.00 yields a requested multiplier of *minus* .46. Multipliers in large class action cases typically range from 2 to 4. *In re Warner Communications*, 618 F. Supp. 735, 749 (S.D.N.Y. 1985) (reviewing multipliers awarded in other cases); *Behrens v. Wometco Enterprises, Inc*. 118 F.R.D. 534, 549 (S.D. Fla. 1988) (recognizing that, in securities class actions, lodestar multipliers usually range between 3 and 4). Factors that the Court may consider in arriving at an appropriate multiplier include: the novelty and difficulty of the questions presented; the skill requisite to perform the legal service properly; whether the fee is fixed or contingent; the amount involved and the results obtained; the experience, reputation, and ability of the attorneys; and awards in similar cases. *Johnson v. Georgia Highway Express, Inc*., 488 F.2d 714 (5th Cir. 1974) (overruled on other grounds).

As discussed below, plaintiffs' attorneys are skilled and experienced in this area of law. They took this case on a pure contingency basis, with no guarantee of recovery, and after investing many attorney hours brought the case to a successful conclusion. Plaintiffs' attorneys respectfully submit that a multiplier of *minus* .46 falls well below the range of multipliers in other class action cases and is justified in this case. *Warner Communications*, supra, 618 F. Supp. at 749.

ii. The Litigation Was Complex

This litigation involved claims for both FLSA violations and state wage and hour violations. The FLSA claims were complex because there are important exemptions that bring these claims out of the FLSA. These exemptions include the administrative exemption, the professional exemption and the salary basis test exemption. The determination of whether such exemptions apply is complex and difficult with conflicting precedent.

The state class action wage and hour claims were also complex because they varied by state. Some states allowed both FLSA claims and state wage and hour claims, other states allowed FLSA claims but not supplemental state wage and hour claims. Some states excluded state wage and hour claims from the FLSA claims because of the perceived conflict between opt in and opt out claims. Other states simply excluded state wage and hour claims where there was already an FLSA remedy. Still other states simply allowed state overtime claims supplemental to FLSA claims but did not have laws against deductions from compensation.

The attorneys in this case had sufficient experience in wage and hour litigation to deal with these complexities. *See* Abrams Decl. ¶¶ 6-7; Carlson Decl. ¶ 2; Sailer Decl. Ex. 3.

iii. __The Litigation Was Highly Risky__

These lawsuits were risky for plaintiffs' counsel since there is not a single reported case that holds that stockbrokers are entitled to overtime pay under federal or state law. To the contrary, on November 27, 2006, the U.S. Department of Labor ("DOL") issued an opinion letter holding that stockbrokers are exempt from overtime under the FLSA's administrative exemption. *See* Abrams Decl., Ex. 3. The opinion letter arguably undermined two key arguments that plaintiffs' attorneys had advanced to defeat the administrative exemption – *i.e.*, that Ryan Beck's draw-versus-commission compensation plan did not meet the salary basis test, and that Ryan Beck's Financial Advisors did not meet the duties test because their primary duty is selling financial products. Regardless of its merit, this opinion letter presented substantial risk to plaintiffs' attorneys because in *Hein v. PNC*, 511 F. Supp.2d 563, 570 (E.D. Pa. 2007), the court accepted the DOL letter as reflecting the "experienced and informed judgment" of the Department of Labor, and held that the plaintiff was exempt from the FLSA overtime provisions. Similarly, in *Miller v. Farmers Insurance Exchange*, 481 F.3d 1119 (9th Cir. 2007), the Ninth Circuit signaled its willingness to defer to the DOL in interpreting the FLSA's administrative exemption. *Id.* at 1128-29 (relying in part on a DOL opinion letter to reverse a $52.5 million class action judgment on behalf of claims adjusters). The fact that plaintiffs' attorneys were able to negotiate a $1,313,064 settlement in this legal environment is a notable achievement.

Plaintiffs' wage deduction claims were also untested. Because there are no reported cases that discuss whether stockbrokers are entitled to reimbursement of business expenses, plaintiffs' attorneys analogized Ryan Beck's compensation structure to commission plans that were found unlawful in *Kerr's Catering v. Department of Industrial Relations*, 57 Cal.2d 319 (1962) and *Quillian v. Lion Oil Co.*, 96 Cal.App.3d 156 (1979). However, Ryan Beck would argue that more recent cases permit an employer to deduct certain business expenses from an employee's incentive pay. *See Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 618-19 (2008) (New York law permits an employer to deduct business expenses as part of the calculation of incentive pay); *Prachasaisoradej v. Ralphs Grocery*, 42 Cal.4th 217 (2007) (an incentive plan that includes business expenses in its compensation formula is legal under California law); Despite these uncertainties, plaintiffs' attorneys willingly undertook the risk on behalf of a class of more than 700 members, knowing that, at any time, a court or government agency might issue a ruling that could gut the plaintiffs' case. Furthermore, in contrast to some other types of class actions, here there was no prior criminal or regulatory investigation to serve as a roadmap to recovery. *C.f. In re Quantum Health Resources, Inc. Securities Litigation*, 962 F. Supp. 1254, 1259 (C.D. Cal. 1997) (court rejected class counsel's argument that securities litigation was risky because the claims were premised on the results of public investigations by state regulatory agencies).

When plaintiffs' counsel first filed these lawsuits, they did so with the knowledge that they would likely commit hundreds of hours of hard work against a leading defense firm with no assurance of ever obtaining any compensation for those efforts. Plaintiffs' counsel has received no payment for four years. The contingent nature of the fee award justifies a 33% fee.

Thus, the risks and uncertainties present in this litigation warrant a 33% fee.

iv. Plaintiff's Counsel Provided Exceptional Representation

"The prosecution and management of a complex national class action requires unique legal skills and abilities." *In re Heritage Bond Litigation*, 02-ML-1475, 2005 U.S. Dist. LEXIS 13627, at *39 (C.D. Cal. June 10, 2005). Managing and then settling these lawsuits required a thorough understanding of the FLSA and the overtime and wage deduction laws of several states. It also took considerable skill and diligence for plaintiffs' attorneys to coordinate the prosecution of two separate class actions against the Ryan Beck defendants.

In particular, plaintiffs' counsel was able to defeat a motion to sever the class action claims of the litigation from the FLSA claims. Judge Conner ruled that plaintiffs' counsel could bring class action claims based on New York law supplemental to the FLSA claim even though the class action claim was an opt out claim while the FLSA was an opt in claim. Docket No. 27. A decision adverse to the plaintiffs could have stopped this litigation in its tracks.

The quality of opposing counsel is also important in evaluating the quality of the work done by Class Counsel. *In Re Equity Funding Corp. Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977) (recognizing that "plaintiffs' attorneys in this class action have been up against established and skillful defense lawyers, and should be compensated accordingly.") In this case, Ryan Beck was represented by a prominent law firm with extensive experience in wage and hour class actions. The ability of plaintiffs' attorneys to obtain such a favorable settlement in the face of this opposition reflects the superior quality of their work.

v. The Requested Fee is Reasonable
in Relation to the Settlement

The settlement consideration will provide approximately $1,144.00 net to each class member claimant if all eligible class members submit claims. If some eligible class members do not submit claims, that amount will be even higher. Abrams Decl. ¶¶ 12-13. Such a result compares favorably to other broker wage and hour cases. Abrams Decl. ¶ 11. Moreover, the requested attorneys' fee, 33% of the settlement amount, represents a reasonable percentage of a common fund in this district. Thus, the requested fee is reasonable in relation to the settlement.

vi. The Requested Attorney's Fees
Achieve Public Policy Objectives

The attorneys' fees requested are adequate to encourage plaintiffs' counsel to accept class action cases on a contingent basis even where the risks are high. Absent such an incentive, potential class members will receive no compensation for violations of wage and hour laws. In the last five years, plaintiffs' counsel in the present case has obtained settlements totaling over $200 million. Abrams Decl. ¶ 7. Without adequate compensation for the attorneys in those cases, the result in this case would not have been achieved. Similarly, the results in this case will encourage such meritorious class actions in the future.

b. Percentage of Recovery of Common Fund

Under the common fund doctrine, courts in this district and circuit typically award attorneys' fees based on a percentage of the total settlement. *In re Sumitomo Copper*

Litig., 1999 U.S. Dist. LEXIS 17610 (S.D.N.Y. 1999) (approving 27.5% fee award on $134 million class recovery); *Kurzweil v. Philip Morris Cos., Inc.*, 1999 U.S. Dist. LEXIS 18378 (S.D.N.Y. 1999) (approving 30% fee award on $116 million class recovery; *In re Crazy Eddie Sec. Litig.*, 824 F. Supp. 320, 326 (E.D.N.Y. 1993) (awarding fees of one-third of class recovery); *In re Chatelain*, 805 F. Supp. 209, 215 (S.D.N.Y. 1992) (awarding fees of one-third of class recovery). *See also Six Mexican Workers v.* Arizona *Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), "[a]lthough statutory awards of attorney's fees are subject to 'lodestar' calculation procedures, a reasonable fee under the common fund doctrine is calculated as a percentage of the recovery." *Id.* at 1311. Every Supreme Court case that has considered the award of attorneys' fees under the common fund doctrine has determined those fees as a percentage of the recovery. See *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768, 773 (11th Cir. 1991) citing *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984) (percentage of recovery method is the appropriate method to award attorneys' fees in common fund cases); *Sprague v. Ticonic National Bank*, 307 U.S. 161 (1939); *Central R.. & Banking Co. v. Pettus*, 113 U.S. 116, 128 (1885); *Trustees v. Greenough*, 105 U.S. 527, 532 (1881).

In deciding whether to award attorneys' fees in a class action settlement, the Court first must determine whether the Settlement establishes a common fund. If so, the Court must then decide whether to use the "percentage of recovery" method to award attorneys' fees. Finally, the Court must evaluate whether a 33% fee is justified under the circumstances of this case. As discussed below, the answer to each of these questions is "yes."

i. The Settlement Establishes a Common Fund

The Supreme Court has consistently recognized that "a litigant or lawyer who recovers a fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Company v. Van Gemert*, 444 U.S. 472, 478 (1980); *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392-93 (1970). The common fund doctrine is a well-recognized exception to the general American rule that a litigant must bear its own attorneys' fees. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-58 (1975). The purpose of the common fund doctrine is to avoid unjust enrichment: "those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it." *In re Washington Public Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir. 1994).

In this case, the Settlement establishes a common fund of $1,313,064, all of which gets used either for awards to class claimants or fees and expenses incurred in the litigation and settlement process. In other words, unlike so many settlements in these broker wage and hour cases, *none of the settlement fund reverts to the defendants even if some eligible class members do not submit claims*.

ii. Use of Percentage of Recovery Method

This Court may decide to use the percentage of recovery method and use the lodestar "cross-check" as well.

The argument in favor of applying the percentage of recovery method is based upon three reasons: First, it more closely aligns the attorneys' interest in being paid a fair fee with the interest of the class in achieving the maximum possible recovery in the shortest amount of time. Second, it reduces the burden on the Court of reviewing the voluminous timesheets of multiple law firms while ensuring that the beneficiaries do not experience undue delay in receiving their share of the Settlement. Third, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated by a percentage of recovery. *In Re Activision Securities Litigation*, 723 F. Supp. 1373, 1378-79 (N.D. Cal. 1989).[1]

iii. The 33% Fee Requested in this Case is Justified

In this District and Circuit, attorneys are often granted fees around 33% of the settlement. *Stefaniak v. HSBC Bank USA, N.A.*, Case No. 1:05-CV-720 S, 2008 U.S. Dist. LEXIS 53872, at *9 (W.D.N.Y. July 28, 2008) (33 1/3% attorneys fee in FLSA and New York labor law settlement); *Strougo v. Bassini*, 258 F. Supp. 2d 254, 262 (S.D.N.Y. 2003) ("Assuming a valuation for the settlement of over $1.5 million as set forth above, a fee of 33 1/3% of the settlement fund is reasonable."); *Klein v. PDG Remediation, Inc.*, No. 95 Civ. 4954(DAB), 1999 WL 38179, at **3-4 (S.D.N.Y. Jan. 28, 1999) ("33% of the settlement fund [ ] is within the range of reasonable attorney fees awarded in the Second Circuit."). Abrams Decl. ¶ 14; Carlson Decl. ¶ 5; Sailer Decl. ¶ 5.Thus, the 33% fee request in this case, when coupled with the absence of a multiplier, is reasonable in relation to the settlement.

By either the lodestar analysis or common fund analysis, the attorneys' fees requested in this case are reasonable.

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[1] Courts in other circuits also favor the percentage method over the lodestar method. Two circuits have ruled that the percentage method is mandatory in common fund cases. *Swedish Hospital Corp. v. Shalala*, 1 F.3d 1261 (D.C. Cir. 1993); *Camden I Condominium Association v. Dunkle*, 946 F.2d 768, 774-75 (11th Cir. 1991). A Third Circuit Task force recommended abandoning the lodestar method in all common fund cases, finding that the lodestar is a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the bench and Bar." *Third Circuit Task Force Report: Court Awarded Attorney Fees*, 108 F.R.D. 237, 258; *see also In re Rite Aid Corporation Securities Litigation*, 396 F.3d 294, 300 (3rd Cir. 2005) ("The percentage-of-recovery method is generally favored in common fund cases because it allows courts to award fees from the fund in a manner that rewards counsel for success and penalizes it for failure.")

B. THE COURT SHOULD AWARD THE REQUESTED EXPENSES

Under the common fund doctrine, litigation expenses are awarded in addition to the amount of attorneys' fees. *In Re Businessland Securities Litigation*, No. C-90-20476, 1991 U.S. Dist. LEXIS 8962, at *6 (N.D. Cal. June 18, 1991) (overruling objection that litigation expenses should be included within the requested 30% fee). As outlined in the attorney declarations filed herewith, plaintiffs' attorneys have incurred the following litigation expenses in connection with the claims against the Ryan Beck defendants:

Firm	**Expenses**
Wolf Haldenstein Adler Freeman & Herz LLP	$17,839.28
Carlson Lynch Ltd.	$5,480.07
Murray, Frank & Sailer LLP	$1,382.08
TOTAL	$24,701.43

Pursuant to the Stipulation §§ 1.1 and 2.10.1, plaintiffs' attorneys may request expenses up to $15,000. In this case, as shown above, the expenses of plaintiffs' counsel exceed that amount. Abrams Decl. ¶ 15; Carlson Decl. ¶ 6; Sailer Decl. ¶ 7, Thus, plaintiffs' attorneys respectfully request that the Court award them $15,000.00 in litigation expenses, payable from the settlement fund.

C. THE COURT SHOULD APPROVE THE REQUESTED ENHANCEMENTS

Sections 1.1 and 2.10.2 of the Stipulation permit plaintiffs' counsel to request enhancement payments to the 2 named plaintiffs in the amount of $10,000 each. Such service payments serve an important function in class actions by rewarding the individuals who have had the initiative and the diligence to prosecute a lawsuit on behalf of a large group of people. In *Lo Re v. Chase Manhattan Corp.*, No. 76 Civ. 154, 1979 U.S. Dist. LEXIS 12210, at **16-17 (S.D.N.Y. May 23, 1979), the court approved payment of $229,000 out of a $1,579,000 settlement fund to the named plaintiffs, which represented the full value of their individual claims. One of the factors considered by the court in determining that such payments were fair was the fact that plaintiffs' efforts conferred a benefit on a substantial number of people. *Id*. at *17. Similarly, in *League of Martin v. City of Milwaukee*, 588 F. Supp. 1004 (E.D. Wis. 1984), the court held that the proposed settlement properly granted the named plaintiff individual relief. It is "not uncommon for class members . . . to receive special treatment in settlement," especially when they have been instrumental in prosecuting the lawsuit. *Id*. at 1024.

As discussed in the declarations of plaintiffs' attorneys, the named plaintiffs provided invaluable assistance by explaining Ryan Beck's compensation policies, reviewing documents, and participating in the settlement negotiations. Abrams Decl. ¶ 17-18; Carlson Decl. ¶ 7. The efforts of only two named plaintiffs have conferred a substantial benefit on approximately 716 class members. Furthermore, plaintiffs willingly accepted the risk that they might be held personally liable for costs if Ryan Beck had prevailed. *See Koehl v. Verio, Inc.*, 142 Cal.App.4th 1313, 1328 (2006) (in wage and hour class action where defendant prevailed at trial, the named plaintiffs were held liable, jointly and severally, for the defendant's attorneys' fees). The requested $10,000 enhancement is in line with the enhancements awarded to the named plaintiffs in the other stockbroker cases that have settled in this district. For example, in *Basile v.*

A.G. Edwards, 08-cv-0338 (JAH) (NLS) (S.D. Cal.), in which Wolf Haldenstein was also lead counsel, a similar $10,000 enhancement was approved by the Court. Abrams Decl. ¶ 17.

III. CONCLUSION

For the foregoing reasons, plaintiffs' attorneys respectfully request that the Court: (1) award plaintiffs' attorneys a total of $433,000.00 in attorneys' fees, plus $15,000.00 in litigation expenses; and (2) award the 2 named plaintiff enhancement payments in the amount of $10,000 each. Plaintiffs will submit a proposed order to this effect in advance of the hearing.

Dated: June 8, 2010

WOLF HALDENSTEIN ADLER
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/s/ Robert Abrams

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